No. 87-548

Supreme Court, U.S.
FILED
MAY 26 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1987

TRANS WORLD AIRLINES, INC.,

Petitioner,

v.

THE INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR PETITIONER

MURRAY GARTNER
PROSKAUER ROSE GOETZ & MENDELSOHN
300 Park Avenue
New York, New York 10022
(212) 909-7000

Counsel of Record

PAUL E. DONNELLY
STINSON MAG & FIZZELL
920 Main Street
Kansas City, Missouri 64105

MARK A. BUCKSTEIN
MICHAEL A. KATZ
605 Third Avenue
New York, New York 10158

Attorneys for Petitioner

Of Counsel

CAROLE O'BLENES
TOBY R. HYMAN
ANDREW P. MARKS

QUESTION PRESENTED

Does the Railway Labor Act require that permanent employees of an air carrier, who exercised their right to work during an economic strike, must lose their jobs at the end of the unsuccessful strike in order to create vacancies for full-term strikers with more "seniority"—who were permanently replaced by new hires and for whom no vacancies would otherwise exist—when there is no back-to-work agreement and no provision of the former collective bargaining agreement authorizes the exercise of "seniority" rights to obtain reinstatement after a strike?

TABLE OF CONTENTS

	PAGE
Table of Authorities	iv
Opinions Below	1
Jurisdiction	1
Statutes Involved	2
Statement of the Case	2
The Material Facts	5
The Inception Of This Action	9
The District Court Decision	9
The Court of Appeals Decision	10
Summary of Argument	14
Argument	18
I. Under Principles Established By This Court Decades Ago, And Uniformly Applied Until Now, The Flight Attendants Who Exercised Their Right To Refrain From Joining The Strike, Or To Return To Work Before Its End, Have As Great A Right To Retain Their Jobs As Do Newly Hired Replacements And Need Not Be Displaced To Create Vacancies For Later Returning Strikers	18
A. The Railway Labor Act: No Statutory Provisions Like Those From Which The Reinstatement Rights Of NLRA Economic Strikers Derive	19

	PAGE
B. *Mackay Radio* And Its Progeny: Settled Rules Under The National Labor Relations Act	21
C. The Settled Rules: Protection Of Non-strikers And Early Returning Strikers	26
II. Relying On Confused And Inapplicable Notions Of "Discrimination," "Union Membership" And "Union Activity," The Decision Below Distorts National Labor Relations Act Authority And Applies That Distortion To The Railway Labor Act	31
A. Only By Describing An Occasion For "Discrimination" That Did Not In Fact Occur, Was The Eighth Circuit Able To Reach Its Novel Result	32
B. The Reliance By The Court Below On The "Union Security" Provisions Of The 1981-84 Agreement Is Without Foundation In Law Or In Reason	33
C. The Eighth Circuit's Unarticulated Assumption That Strikers Are Entitled To Reinstatement In Seniority Order Is Incorrect And, In Any Event, Irrelevant	38
D. The Court Below Apparently Misapprehended And Clearly Misapplied *Erie Resistor*	41
Conclusion	49
Appendix A	
Supplementary Text of Statutes Involved	A-1

TABLE OF AUTHORITIES

Cases: PAGE

Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977) ... 16

Aeronautical Indus. Dist. Lodge 727 v. Campbell, 337 U.S. 521 (1949) ... 38

Air Line Pilots Ass'n v. United Air Lines, 614 F. Supp. 1020, *amended*, 616 F. Supp. 849 (N.D. Ill. 1985), *aff'd in part and rev'd in part on other grounds*, 802 F.2d 886 (7th Cir. 1986), *cert. denied*, 107 S. Ct. 1605 (1987) ... 20, 37, 47

Bartlett-Collins Co., 110 N.L.R.B. 395 (1954), *aff'd sub nom. American Flint Glass Workers' Union v. NLRB*, 230 F.2d 212 (D.C. Cir.), *cert. denied*, 351 U.S. 988 (1956) ... 22

Belknap, Inc. v. Hale, 463 U.S. 491 (1983) ... 19, 25, 44

Bingham Willamette, 282 N.L.R.B. No. 165 (1987) ... 38

Bio-Science Laboratories, 209 N.L.R.B. 796 (1974) ... 38

Brotherhood of Locomotive Engineers v. Baltimore & Ohio R.R., 372 U.S. 284 (1963) ... 41

Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co., 394 U.S. 369 (1969) ... 18, 19, 20, 21

Brown & Root, Inc., 132 N.L.R.B. 486 (1961), *enforced*, 311 F.2d 447 (8th Cir. 1963) ... 22

Burlington N.R.R. v. Brotherhood of Maintenance of Way Employes, 107 S. Ct. 1841 (1987) ... 19

Chicago & N.W. Ry. v. United Transp. Union, 402 U.S. 570 (1971) ... 41

Detroit & Toledo Shore Line R.R. v. United Transp. Union, 396 U.S. 142 (1969) ... 18

PAGE

Ellis v. Brotherhood of Ry., Airline & S.S. Clerks, 466 U.S. 435 (1984) ... 11

Flight Engineers Int'l Ass'n v. Eastern Air Lines, 359 F.2d 303 (2d Cir. 1966) ... 20

Flight Engineers Int'l Ass'n v. Eastern Air Lines, 208 F. Supp. 182 (S.D.N.Y.), *aff'd*, 307 F.2d 510 (2d Cir. 1962), *cert. denied*, 372 U.S. 945 (1963) ... 45

George Banta Co., 256 N.L.R.B. 1197 (1981), *enforced*, 686 F.2d 10 (D.C. Cir. 1982), *cert. denied*, 460 U.S. 1082 (1983) ... 45, 46, 48

Giddings & Lewis, Inc. v. NLRB, 675 F.2d 926 (7th Cir. 1982) ... 10, 24, 40, 41, 47

Harding Glass Indus. v. NLRB, 672 F.2d 1330 (10th Cir. 1982) ... 25

H. & F. Binch Co. v. NLRB, 456 F.2d 357 (2d Cir. 1972) 29

Hot Shoppes, Inc., 146 N.L.R.B. 802 (1964) ... 21

I. Bahcall Steel & Pipe, 287 N.L.R.B. No. 139 (1988) .. 45

Independent Fed. of Flight Attendants v. Trans World Airlines, 682 F. Supp. 1003 (W.D. Mo. 1988), *judgment amended* (May 17, 1988) ... 6

Independant Union of Flight Attendants v. Pan American World Airways, 789 F.2d 139 (2d Cir. 1986) ... 20

Indiana Desk Co., 276 N.L.R.B. 1429 (1985) ... 38, 39

International Ass'n of Machinists v. J.L. Clark Co., 471 F.2d 694 (7th Cir. 1972) ... 13, 30, 46, 47

International Ass'n of Machinists v. Street, 367 U.S. 740 (1961) ... 16

International Bh'd of Teamsters v. Pan American World Airways, 607 F. Supp. 609 (E.D.N.Y. 1985) ... 20

PAGE

Laidlaw Corp., 171 N.L.R.B. 1366 (1968), *enforced*, 414 F.2d 99 (7th Cir. 1969), *cert. denied*, 397 U.S. 920 (1970) 19, 23, 28, 29, 39

Lodges 743 & 1746, Int'l Ass'n of Machinists v. United Aircraft Corp., 534 F.2d 422 (2d Cir. 1975), *cert. denied*, 429 U.S. 825 (1976) 25

NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175 (1967) 35

NLRB v. American Olean Tile Co., 826 F.2d 1496 (6th Cir. 1987) 29, 38, 40

NLRB v. Brown, 380 U.S. 278 (1965) 21

NLRB v. Erie Resistor Corp., 373 U.S. 221 (1963) ....*passim*

NLRB v. Fleetwood Trailer Co., 389 U.S. 375 (1967)..*passim*

NLRB v. Harrison Ready Mix Concrete, Inc., 770 F.2d 78 (6th Cir. 1985) 10, 29, 40

NLRB v. International Van Lines, 409 U.S. 48 (1972).. 25

NLRB v. Mackay Radio & Tel. Co., 304 U.S. 333 (1938).....*passim*

NLRB v. Southern Fla. Hotel & Motel Ass'n, 751 F.2d 1571 (11th Cir. 1985)..... 25, 29

NLRB v. Transport Co., 438 F.2d 258 (5th Cir. 1971) .23, 29

Pattern Makers' League of N. Am. v. NLRB, 473 U.S. 95 (1985)..... 35

Railway Employes' Dep't v. Hanson, 351 U.S. 225 (1956) 16

Randall, Div. of Textron, Inc. v. NLRB, 687 F.2d 1240 (8th Cir. 1982), *cert. denied*, 461 U.S. 914 (1983) ...*passim*

Stepanischen v. Merchants Despatch Transp. Corp., 722 F.2d 922 (1st Cir. 1983) 37

Texas & N.O.R.R. v. Railway Clerks, 281 U.S. 548 (1930) 18

PAGE

The Texas Co., 93 N.L.R.B. 1358 (1951), *enf. denied on other grounds*, 198 F.2d 540 (9th Cir. 1952)..... 45

Trans World Airlines v. Independent Fed. of Flight Attendants, 809 F.2d 483 (8th Cir. 1987), *aff'd per curiam by an equally divided Court*, 108 S. Ct. 1101 (1988), *pet. for reh'g pending*.....4, 34, 35

Virginia Ry. v. System Fed. No. 40, 300 U.S. 515 (1937) 41

Vulcan Hart Corp. v. NLRB, 718 F.2d 269 (8th Cir. 1983) 21, 24, 29

Wells Fargo Armored Serv. Corp., 237 N.L.R.B. 605 (1978), *enf. denied on other grounds*, 597 F.2d 7 (1st Cir. 1979)..... 29, 38

Statutes:

Railway Labor Act

Section 1 Fifth, 45 U.S.C. § 151, Fifth..... 2
Section 1a, 45 U.S.C. § 151a..... 2, 20
Section 2 Third, 45 U.S.C. § 152, Third..... 2, 20
Section 2 Fourth, 45 U.S.C. § 152, Fourth..... 2, 20
Section 2 Eleventh, 45 U.S.C. § 152, Eleventh ...2, 11, 13, 16, 35
Section 6, 45 U.S.C. § 156..... 5
Section 201, 45 U.S.C. § 181..... 2
Section 202, 45 U.S.C. § 182..... 2

National Labor Relations Act

Section 2(3), 29 U.S.C. § 152 (3) 2, 19, 20, 23, 27
Section 7, 29 U.S.C. § 157..... 2, 20
Section 8(a)(1), 29 U.S.C. § 158(a)(1) 2
Section 8(a)(3), 29 U.S.C. § 158(a)(3) 2, 36
Section 13, 29 U.S.C. § 163 .....2, 19, 20

PAGE

Other Authorities:

S. Rep. No. 105, 80th Cong., 1st Sess., *reprinted in* 1 NLRB, Legislative History of the Labor Management Relations Act, 1947 (1948) 21

93 Cong. Rec. 4310 (1948), *reprinted in* 2 NLRB, Legislative History of the Labor Management Relations Act, 1947 (1948) 21

S. Doc. No. 10, 86th Cong., 1st Sess., *reprinted in* 1 NLRB, Legislative History of the Labor-Management Reporting and Disclosure Act of 1959 (1959)..... 22

105 Cong. Rec. A8247 (1959), *reprinted in* 1 NLRB, Legislative History of the Labor-Management Reporting and Disclosure Act of 1959 22

20 U.S. Supreme Court Records and Briefs (Oct. Term 1967)..... 28

R. Gorman, *Basic Text on Labor Law* (1976) 14

C. Morris, *The Developing Labor Law* (1983)..... 14

IN THE

Supreme Court of the United States

OCTOBER TERM 1987

No. 87-548

TRANS WORLD AIRLINES, INC.,

Petitioner,

v.

THE INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

OPINIONS BELOW

The opinion and judgment of the United States Court of Appeals for the Eighth Circuit (App. Cert. 1)[1] is reported at 819 F.2d 839, 125 L.R.R.M. 2544. It affirms in part and reverses in part a judgment of the United States District Court for the Western District of Missouri, St. Joseph Division (App. Cert. 18) based on a memorandum and order reported at 643 F. Supp. 470, 123 L.R.R.M. 2337.

JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit was entered on May 26, 1987. On June 5, 1987,

---

1 "App. Cert. ____" refers to the Appendices to the Petition for Writ of Certiorari. "JA ____" refers to the Joint Appendix.

Trans World Airlines, Inc. ("TWA")[2] timely filed a Petition for Rehearing and Suggestion for Rehearing En Banc. The court below entered an order (App. Cert. 16) denying the petition on August 31, 1987. (Circuit Judges Bowman, Fagg and J. Gibson would have granted the petition; Circuit Judges Ross and Magill did not participate.) The petition for a writ of certiorari was timely filed on October 1, 1987 and was granted on March 21, 1988. The jurisdiction of this Court rests upon Section 1254(1) of the Judicial Code (28 U.S.C. § 1254(1)).

STATUTES INVOLVED

The relevant statutory provisions are the Railway Labor Act ("RLA" or "the Act"), as amended, Section 1 Fifth (45 U.S.C. § 151, Fifth); Section 1a (45 U.S.C. § 151a); Section 2 Third (45 U.S.C. § 152, Third); Section 2 Fourth (45 U.S.C. § 152, Fourth); Section 2 Eleventh (45 U.S.C. § 152, Eleventh); Section 201 (45 U.S.C. § 181); Section 202 (45 U.S.C. § 182); and the National Labor Relations Act ("NLRA"), as amended, Section 2(3) (29 U.S.C. § 152(3)); Section 7 (29 U.S.C. § 157); Section 8(a)(1) and (3) (29 U.S.C. § 158(a)(1) and (3)); and Section 13 (29 U.S.C. § 163). They are reprinted, in part, as Appendix F (App. Cert. 42-46) to the petition for certiorari and, in part, as Appendix A to this brief.

STATEMENT OF THE CASE

The court below, contrary to the district court, sustained Respondent's challenge to unremarkable employer action that has been accepted as lawful by the courts, the National Labor Relations Board and, indeed, labor organizations for fifty years.

Following an unsuccessful economic strike by the Independent Federation of Flight Attendants ("IFFA" or "the Union")—which ended with no back-to-work agreement—TWA reinstated strikers to available vacancies. Like countless

2 TWA has no parent company and no affiliates or subsidiaries, other than wholly-owned subsidiaries.

other employers in the past, it did not displace permanent employees who had worked during the strike in order to *create* vacancies for unreinstated strikers. Since the end of the strike, TWA has maintained a preferential rehire list from which more than 1,100 strikers have been reinstated as vacancies became available. Although not required to do so, TWA has voluntarily reinstated those strikers in seniority order[3] and, upon reinstatement, they have enjoyed the full benefit of their seniority.

Among the working flight attendants not displaced at the end of the strike (in addition to new employees hired during the strike as permanent replacements) were approximately 1,280 flight attendants employed by TWA before the strike began ("incumbents")—who had exercised their right to refrain from striking or to abandon the strike and cross IFFA picket lines in order to return to work.[4] It is undisputed that all were "permanent" employees and that they, like the newly hired replacements, had been told that they would not be displaced at the end of the strike to make room for returning strikers.

Citing this Court's decision in *NLRB* v. *Mackay Radio & Tel. Co.*, 304 U.S. 333, 345-46 (1938) ("*Mackay Radio*"), the Eighth Circuit acknowledged the fundamental principles controlling here:

3 In that regard, it is irrelevant whether the 1981-84 collective bargaining agreement between TWA and IFFA remained in effect during and after the strike. As the district court found, that agreement "does not authorize the exercise of seniority rights to obtain reinstatement after a strike." (App. Cert. 22) The Eighth Circuit did not question the district court's finding.

4 Both IFFA and the court below have referred to these flight attendants as "cross-overs" (App. Cert. 7-10) as if the only significant fact concerning their employment were the crossing of picket lines in order to work. The so-called "cross-overs" are referred to in this brief as "incumbents" because (i) that term encompasses the flight attendants who never joined the strike, as well as those who returned to work before its end; (ii) it acknowledges that the flight attendants in question were permanent employees of TWA before the strike began; and (iii) it reflects the critical fact that they were already working as part of TWA's permanent flight attendant workforce when IFFA offered, on behalf of the remaining strikers, to return to work.

- During an economic strike, "the employer may hire permanent replacements for strikers in order to continue business operations";
- "Once an employer hires permanent replacements, economic strikers are entitled to reinstatement only as vacancies occur";
- "The employer is not required to discharge permanent replacements in order to rehire striking employees." (App. Cert. 5)

Applying those principles, the court below correctly held that some 1,200 "new hires" employed during the first week of the strike were not subject to displacement by returning strikers. (App. Cert. 5-6)

Departing from the *Mackay Radio* rule and rationale, however, the Eighth Circuit reversed the district court's clearly correct decision that incumbents are entitled to at least as much protection in their jobs as new hires, and held that incumbents must surrender their jobs to unreinstated strikers with greater "seniority." (App. Cert. 10)[5] Relying principally on its earlier decision in the TWA-IFFA litigation, which is presently before this Court on petition for rehearing,[6] the court below in effect concluded that, by working during the strike, the incumbents were not preventing their own replacement and preserving their own jobs, or replacing flight attendants who chose not to work—but rather were preventing the replacement of more "senior" strikers. It thus shifted the principal risk associated with exercise of the right to strike, *i.e.*, possible job loss due to

5 "Seniority" is set off with quotation marks because the TWA/IFFA contract did not define seniority to include a right to displace working employees after a strike based upon length of service; strikers, therefore, did not have "seniority" for that purpose.

6 *Trans World Airlines* v. *Independent Fed. of Flight Attendants*, 809 F.2d 483 (8th Cir. 1987), *aff'd per curiam by an equally divided Court*, 108 S. Ct. 1101 (1988), *pet. for reh'g pending* ("*TWA I*"). In *TWA I*, the Eighth Circuit held that the "union security" clause of the 1981-84 agreement between TWA and IFFA remained in effect, and required the compulsory payment of union dues by the incumbents, as well as by newly hired permanent replacements, during and after the strike. IFFA filed a response to the petition for rehearing on May 18, 1988.

replacement or a reduction in the workforce for economic reasons, away from the most "senior" of those who exercised their right to strike and placed that cost of the strike on employees who exercised their right *not* to strike.

No sound reason or authority was offered for this dramatic alteration of the well-established rules under which employers and unions have long operated in deciding whether to exercise, and in exercising, their respective rights of self-help. Nor did the Eighth Circuit address the anomalous result of its decision: newly hired permanent replacements, with minimal length of employment, are protected in their jobs as against the claims of unreinstated strikers (as this Court has held they must be), while permanent employees with years of service—who also exercised their right not to support the strike—must yield their jobs to many of the same strikers, as though the working employees, and not the strikers, had been replaced.[7]

The Material Facts

TWA and IFFA were parties to a collective bargaining agreement with a stated term from August 1, 1981 to July 31, 1984. The agreement did not authorize the exercise of seniority to obtain reinstatement after a strike. (App. Cert. 22) Following written notice under Section 6 of the Railway Labor Act (45 U.S.C. § 156), negotiations for a new agreement began in March 1984 and proceeded, without success, through the steps required by the RLA, including direct negotiation, mediation and the final 30-day cooling-off period. On March 7, 1986, approximately two years after negotiations began, IFFA called a

7 Under the Eighth Circuit's reading of *Mackay Radio* and *NLRB* v. *Erie Resistor Corp.*, 373 U.S. 221 (1963), if the 100 most junior employees in a workforce of 200 choose not to strike, and if the employer hires replacements for the 100 strikers, the workforce at the end of the strike must be reconstituted to consist solely of the strikers and the newly hired strike replacements. In other words, the employees who did *not* strike would lose their jobs as a result of the employer's decision to replace those who did!

strike against TWA. For purposes of this action, it has been assumed that the strike was over only economic issues.[8]

In order to avoid interruption of its services, TWA operated with those flight attendants who wished to continue or resume working ("incumbents") and hired permanent replacements for the striking flight attendants to complete its workforce. Approximately 1,280 incumbents worked during the strike. (App. Cert. 61) Some never joined the strike; others, who had initially joined the strike, were reinstated by TWA to available vacancies as they offered to return to work during the strike.[9] In addition, TWA hired approximately 2,800 permanent replacements, some 400 of whom were about to complete their training at TWA's Travel College ("TWTC") when the Union called off its unsuccessful strike. (App. Cert. 59, 60)

TWA had given advance notice to the Union and to the flight attendants that, in the event of a strike, it would hire permanent replacements. For example, a February 13, 1986 letter mailed to all flight attendants stated:

> While we do not wish a strike you should be aware that if there is a strike *TWA Will Continue to Operate* . . . . If you do not report for work, the Company is permitted under the law to hire "permanent" replacements for striking employees. We plan to exercise this right, if necessary, in order to continue flight operations. (JA 118; emphasis in original)

TWA had also made plain that the hiring of permanent replacements would put strikers at risk of losing their jobs, subject to rehiring from a preferential rehire list. (JA 120-21, 125)

All flight attendants, like the permanent replacements, were told that if they worked during the strike, they would not be displaced to make room for returning strikers. (App. Cert. 24 n.2; JA 118-22) A week after the strike began, TWA wrote to all flight attendants, assuring the strikers that if they returned to a still vacant position, they would not be displaced at the end of the strike, but stating that TWA had hired and was continuing to hire permanent replacements. (JA 129-31) Another letter, sent on March 29 to all working flight attendants, stated:

> I have heard that IFFA continues to threaten newly hired and other working flight attendants by indicating that they will lose their jobs when the strike is settled unless they cease working and join the picket line . . . . Let me reassure you in writing . . . that if and when a settlement is reached, under no circumstances will newly hired or other working flight attendants be furloughed to make room for returning strikers. (JA 137-38)

On May 17, 1986, although there was no back-to-work agreement and no successor to the 1981-84 collective bargaining agreement, IFFA offered on behalf of striking flight attendants to return to work. Its May 17 letter to TWA stated:

> This offer is made on behalf of all employees who went on strike and *have not returned to work to date*. In the event there are no openings, or insufficient openings, as of the date you receive this offer, you are further advised that said employees will be available for employment to *all openings as and when they develop or to vacancies created by the departure of employees now working*. (JA 80; emphasis added)

A May 18 letter from IFFA, demanding the reinstatement of strikers in seniority order, specifically noted:

> TWA's information as to the identity of those [flight attendants] who have already crossed picket lines and returned to work may be more complete than IFFA's. Accordingly if and when in the recall process TWA comes to the name of an individual who returned prior to IFFA's unconditional offer to return all employees, the recall

---

8 The District Court for the Western District of Missouri has now held that IFFA's strike was an economic one, neither caused nor prolonged by alleged employer violations of the Railway Labor Act. *Independent Fed. of Flight Attendants* v. *Trans World Airlines*, 682 F. Supp. 1003 (W.D. Mo. 1988), *judgment amended* (May 17, 1988).

9 TWA could not properly have refused to reinstate former strikers who offered to return to work while vacancies were available and instead hired new employees to fill the vacancies.

should go to the next individual who has not returned prior to such unconditional offer. (JA 83-84)

On May 21, IFFA again took the position that full-term strikers were entitled to reinstatement in seniority order and advised that, "if recall is made out of seniority order, employees so recalled will return to work—but IFFA will seek full backpay for each employee passed over for *an opening* that would be his/hers if based on seniority." (JA 88; emphasis added) The letters of May 17, 18 and 21 contained no suggestion that the strikers (if economic strikers) were entitled to displace working flight attendants or had any entitlement to reinstatement in the absence of an "opening" or "vacancy."[10]

When IFFA called off its strike, there were fewer than 200 flight attendant vacancies to be filled.[11] TWA drew up a preferential rehire list of all strikers on whose behalf IFFA had offered to return to work and filled the available vacancies from that list. Although not required to do so (*see* n.3, *supra*), TWA maintained the rehire list, and reinstated strikers, in seniority order. (JA 91) At the end of the strike, 197 strikers were offered reinstatement from the preferential rehire list. (JA 94) Since then, more than 900 additional full-term strikers have been reinstated as vacancies occurred. TWA has not hired new flight attendants since the end of the strike.

Upon reinstatement, all strikers were credited with their full pre-strike seniority for all purposes, including protection against layoff and bidding for flight assignments. (JA 110) Pursuant to an arbitral award, they have also been credited with accrued seniority for the entire duration of the strike, as well as any time from the end of the strike to the date of their reinstatement. Thus, the reinstated full-term strikers are senior to all

10 Not until May 27, 1986 (three days before this action was commenced) did IFFA demand the displacement of incumbents with less "seniority" than unreinstated strikers. (JA 147-48)

11 In speaking of the vacancies at the end of the strike, we leave aside those "vacancies" that later resulted from the Eighth Circuit's decision that some 400 flight attendants in training at the TWTC when the strike ended were not "employees" within the meaning of the Railway Labor Act; strikers are being reinstated to positions that were filled by those trainees.

permanent replacements, and their seniority relative to that of the incumbents is precisely the same as it would have been if there had been no strike, or if all pre-strike flight attendants had struck and then remained on strike for the same length of time.

The Inception of This Action

IFFA commenced this action on May 30, 1986. Jurisdiction was invoked pursuant to the RLA (45 U.S.C. §§ 151 *et seq.*) and Sections 1331 and 1337 of the Judicial Code (28 U.S.C. §§ 1331, 1337).

IFFA's first amended complaint alleged two claims. In Count I, the Union sought a declaratory judgment and injunctive relief requiring TWA, as of May 17, 1986, to reinstate approximately 3,000 full-term strikers, displacing over 1,200 replacements hired during the first week of the strike and the approximately 400 last hired before May 17, 1986, as well as all the incumbents (or "cross-over strikers," as IFFA called them) on the ground that the flight attendants to be displaced were not "permanent replacements." (App. Cert. 47-55) In Count II, IFFA sought similar relief, as to all replacements, on the ground that TWA had no "legitimate and substantial business justification" for hiring permanent replacements. (App. Cert. 55-56) On July 21, 1986, IFFA moved for partial summary judgment solely on Count I; TWA's cross-motion also was limited to Count I. (App. Cert. 64-67)

The District Court Decision

The district court held that newly hired permanent replacements, with the exception of the flight attendants in training at the TWTC when the strike ended, need not yield their jobs to returning strikers. (App. Cert. 26-35) Noting that neither the Union nor the authorities reviewed by the court suggested any reason why incumbents should be afforded less protection against displacement than new-hire replacements, the district court also held that the incumbents were not subject to displacement by more senior strikers. (App. Cert. 22-25) It relied on *Mackay Radio*, 304 U.S. 333; *NLRB* v. *Erie Resistor Corp.*,

373 U.S. 221 (1963) ("*Erie Resistor*"); *Randall, Div. of Textron, Inc.* v. *NLRB*, 687 F.2d 1240 (8th Cir. 1982), *cert. denied*, 461 U.S. 914 (1983) ("*Randall*"); *NLRB* v. *Harrison Ready Mix Concrete, Inc.*, 770 F.2d 78 (6th Cir. 1985); and *Giddings & Lewis, Inc.* v. *NLRB*, 675 F.2d 926 (7th Cir. 1982).

In particular, the district court emphasized this Court's language in *Erie Resistor*:

> "[A]n employer may operate his plant during a strike and at its conclusion need not discharge those who worked during the strike in order to make way for returning strikers." 373 U.S. at 232. (App. Cert. 22)

As the district court observed, "[t]his language . . . would protect crossovers as well as new hires from being displaced after a strike." (App. Cert. 22) The court also relied on the Eighth Circuit's implicit sanction in *Randall* of the retention of incumbents at the end of a strike, although some full-term strikers had not been reinstated. "It is quite clear," the district court said, "that the Eighth Circuit had no criticism of simply giving 'permanence' to those who remained at work. It is equally clear that the [Eighth Circuit] knew it was dealing with a situation involving crossovers as well as new hires." (App. Cert. 22-23)

Thus, the district court concluded that the language of *Erie Resistor* and *Randall* "is broadly protective of the rights of *all* persons who work during a strike." (App. Cert. 25; emphasis added) It also reasoned that such protection is "fully justified" (App. Cert. 25) by the rationale of *Mackay Radio*. IFFA's argument that NLRA precedent should be disregarded because of the allegedly greater reinstatement rights of strikers under the Railway Labor Act was rejected as "wholly lacking in support in the cases." (App. Cert. 25)

The Court of Appeals Decision

Citing *Mackay Radio*, the Eighth Circuit affirmed the district court's ruling that new hires may retain their jobs as against the claims of unreinstated strikers. (App. Cert. 5-6) It also affirmed, although on different grounds (not argued or briefed by the parties), the holding that some 400 flight attendants in training at the TWTC when the strike ended were subject to displacement by returning strikers. (App. Cert. 10-14) Neither of these aspects of the decision below is before the Court.[12]

With respect to the incumbents, the Court of Appeals reversed the district court—holding that unreinstated strikers are entitled to displace incumbents with less "seniority." (App. Cert. 7-10) It explained the principal underpinning of its conclusion as follows:

> Most importantly, the terms of the bargaining agreement prevent the cross-overs from being considered permanent replacements. In *TWA I*, *supra*, this court decided that those portions of the agreement not opened for bargaining were not terminated at impasse, but remained in effect. 809 F.2d at 492. Accordingly, the union security clause which provides that union membership is a condition of continued employment with TWA remains in effect. *See* 45 U.S.C. § 152, Eleventh (authorizing "closed shop" agreements).
>
> Thus, all cross-overs must retain their union membership. TWA may not discriminate among union members based on the degree of their union activity. Accordingly, TWA may not accord cross-overs permanent replacement status and prevent full-term strikers from displacing cross-overs with less seniority because such action impermissibly discriminates among union members based on the degree of their union activity. (App. Cert. 7; footnote omitted)

In emphasizing "union membership," the Eighth Circuit apparently confused actual "membership" in the Union with the compulsory payment of union dues. Citing *Ellis* v. *Brotherhood of Ry., Airline & S.S. Clerks*, 466 U.S. 435, 439 (1984), the court acknowledged that, even where a union "membership" provision is in effect, the RLA requires no more than the timely

---

12 The Union did not seek review of the Eighth Circuit's affirmance with respect to new hires. On March 21, 1988, this Court denied TWA's petition for review of the Eighth Circuit's ruling on the status of the flight attendants in training when the strike ended. 108 S. Ct. 1219 (1988).

payment of initiation fees and dues. (App. Cert. 8 n.5)[13] It noted, moreover, that the incumbents had "apparently ceased their union memberships except for payment of dues" and was willing to assume, for purposes of its decision, that "union members may resign from all obligations except that of paying dues . . . ." (App. Cert. 8) Thus, it seemed to treat the compulsory payment of union dues as constituting "membership" in the Union.

As the court below recognized, if the union security clause remained in effect, new hires (once employed for 60 days) were—like the incumbents—required to pay dues to the Union as a condition of continued employment by TWA. (App. Cert. 7 n.4) Purporting to explain why the new hires need not yield their jobs to strikers, the Eighth Circuit observed that they "were not union members when they began work during the strike" and therefore "cannot be the subject of discrimination based upon union loyalty and activity." (App. Cert. 7 n.4) The court did not explain why; nor did it make any reference to the fact that, by the end of the strike, at least under *TWA I*, a minimum of 1,200 new hires were obligated to pay dues to the Union and, therefore, by the court's definition were also "union members."

As further justification for its holding that incumbents must yield their jobs to strikers, the Eighth Circuit relied on *Erie Resistor*, where this Court held that an award of "super-seniority" to those who worked during a strike violated the National Labor Relations Act. The court below did not discuss the *Erie Resistor* language relied on by the district court as "protect[ing] crossovers as well as new hires from being displaced after a strike" (App. Cert. 22)—although it did recognize that in *Erie Resistor* the employer had operated during the strike with both "permanent replacements and cross-overs." (App. Cert. 8)

13 This is reflected in Article 24 of the 1981-84 agreement between TWA and IFFA, under which "membership in good standing in the Union" is explicitly limited to "the payment by the employee . . . of dues for each calendar month and initiation fees (not including fines and penalties), which are uniformly required of members of his/her classification as a condition of acquiring or retaining membership." (JA 63)

The Eighth Circuit also acknowledged that TWA did not award "super-seniority" to those who worked during the strike, but opined that "several of the concerns voiced by the Court in *Erie Resistor* are applicable to the status of the cross-overs here." (App. Cert. 8) Specifically, it stated:

> Awarding the cross-overs permanent replacement status differentiates employees on the basis of their union activity, induces employees to abandon the strike and is likely to create long-term conflict and division within the workforce of those working together under the union security clause. (App. Cert. 9)

The court did not explain how the mere retention of early returning strikers resulted in "differentiat[ion]," "induce-[ment]" or "conflict and division" here, when the same treatment of reinstated strikers was found unexceptionable in *Erie Resistor* itself. Nor did it identify any reason why the retention of incumbents poses new or additional risks for strikers beyond those that flow from the retention of permanent replacements, which it accepted as lawful.

The Eighth Circuit went on to emphasize that "an employer may not divide the workforce into those who engaged in strike activity and those who did not" (App. Cert. 9); it did not explain in what way TWA had "divide[d]" its workforce. The court cited *International Ass'n of Machinists* v. *J.L. Clark Co.*, 471 F.2d 694 (7th Cir. 1972), for the so-called "rule that cross-overs returning to their *old* positions are not permanent replacements" (App. Cert. 9; emphasis added), but did not examine whether the incumbents here had in fact returned to their "old positions." And *Randall*, 687 F.2d 1240, relied on by the district court as implicitly sanctioning the retention of incumbents (App. Cert. 22-23), was distinguished by the absence of "a closed shop agreement" between the parties (App. Cert. 10).[14]

14 The court's reference to "a closed shop agreement" between TWA and IFFA (App. Cert. 10), and its citation of RLA Section 2 Eleventh as "authorizing 'closed shop' agreements" (App. Cert. 7), are inexplicable. It is clear beyond question that such agreements are unlawful under both the RLA and the NLRA and, in any event, that no such provision was contained

SUMMARY OF ARGUMENT

Without any principled or even rational basis of support, the decision below is an unprecedented departure from well-settled rules governing the relationship between management and labor, and between strikers and non-strikers. It is also contrary to fundamental principles established by this Court decades ago—principles that formed the legal framework within which the collective bargaining process has been conducted and labor disputants have decided, once the statutory procedures for reaching agreement have been exhausted, whether to resort to self-help.

Purporting to rely on authority under the National Labor Relations Act, the court below concluded:

- that TWA violated the Railway Labor Act by failing to reinstate strikers for whom there were no vacancies at the end of the strike

  —although this Court said in *Mackay Radio* that it is not an unfair labor practice "to reinstate only so many of the strikers as there [are] vacant places to be filled" (304 U.S. at 346);

- that TWA "discriminated" on the basis of "union activity" (App. Cert. 7, 8, 9) by retaining incumbents who had exercised their right to work during the strike

  —although this Court confirmed in *Erie Resistor* that, when particular union activity (*i.e.*, a strike) comes to an end, it is not impermissible discrimination for an employer to retain "those who worked during the strike" even if strikers remain unreinstated (373 U.S. at 232); and

- that full-term strikers are entitled to *displace* less "senior" non-strikers and early returning strikers

in the TWA/IFFA agreement. *See* R. Gorman, *Basic Text on Labor Law* 641-42 (1976); C. Morris, *The Developing Labor Law* 1362 (1983); *see also* n.13, *supra*.

  —although this Court made plain in *NLRB* v. *Fleetwood Trailer Co.*, 389 U.S. 375, 381 (1967) ("*Fleetwood*") that a returning economic striker is "entitled" to an offer of reinstatement only "[i]f and when a job for which the striker is qualified becomes available."

Since *Mackay Radio* and until the decision below, no court or administrative agency, under the NLRA or the RLA, has required an employer to displace permanent employees in order to create vacancies for returning economic strikers simply because the strikers have more pre-strike "seniority" than incumbent employees. Nor is there any sound authority even suggesting that non-strikers or early returning strikers have less protection against displacement than do new employees hired during the strike. Thus, it has been a settled principle, flowing from the employer's heretofore unquestioned right to continue to operate during a strike (with the help of those who are willing to work), that one of the risks associated with striking is possible job loss (subject to reinstatement from a preferential rehire list) if there are no vacancies when a striker offers to return to work. No court (including the court below) has found that risk, even if realized, to be an impermissible burden on or interference with the right to strike, or to constitute discrimination on the basis of union activity.

Only by mischaracterizing the material facts, and by relying on confused notions of "discrimination," "union membership" and "union activity"—instead of accepting this Court's teaching that, *in the absence of vacancies*, an employer has no obligation to reinstate economic strikers—did the Eighth Circuit reach its unprecedented result. The court found, for example, that TWA "differentiate[d] employees on the basis of their union activity" (App. Cert. 9)—when TWA simply applied to incumbents the same basic principle later applied to full-term strikers: upon their unconditional offer to return to work, they were *entitled* to fill vacant positions for which they were qualified. It read *Erie Resistor* as diminishing the rights of TWA and the incumbents under the *Mackay Radio* doctrine, although this Court said in *Erie Resistor* that it had "no intention of ques-

tioning the continuing vitality of the *Mackay* rule . . . ." 373 U.S. at 232. And it applied the concept of "union membership" to subordinate the employment rights of incumbents to new-hire permanent replacements and full-term strikers, although this Court has made plain that the requirement of "union membership" does not mean that employees must in fact join the union, and that employment rights may be conditioned on "union membership" only to the extent of requiring the payment of initiation fees and dues.[15]

Even if the decision below were not so clearly contrary to settled principles and unquestioned authority, its practical effects would be more than sufficient grounds for rejecting the Eighth Circuit's conclusion. Under the decision below, for example,

- pre-strike employees (some with many years of service) have *less* protection against displacement at the end of a strike than do newly hired permanent replacements;
- the principal risk associated with exercising the right to strike is shifted from the most "senior" of those who chose to strike and placed on employees who chose *not* to strike;
- the requirement that incumbent employees pay dues to a union as a condition of continued employment is, in

15 In 1951 Congress amended the RLA to permit employers and unions to include union security requirements in their agreements for the "limited purpose of eliminating the problems created by the 'free rider' "—"those employees who obtained the benefits of the unions' participation in the machinery of the Act without financially supporting the unions." *International Ass'n of Machinists* v. *Street*, 367 U.S. 740, 767, 761 (1961).

Accordingly, in *Railway Employes' Dep't* v. *Hanson*, 351 U.S. 225, 235 (1956), this Court made clear that the union security agreements authorized by Section 2 Eleventh of the RLA are restricted to conditioning continued employment on "the payment of 'periodic dues, initiation fees, and assessments.' " *See also Abood* v. *Detroit Bd. of Educ.*, 431 U.S. 209, 217 n.10 (1977) (citations omitted), where the Court stated:

> Under both the National Labor Relations Act and the Railway Labor Act, "[i]t is permissible to condition employment upon membership, but membership, insofar as it has significance to employment rights, may in turn be conditioned only upon payment of fees and dues."

effect, converted into a back-to-work agreement under which dues-payers *lose* their right to continued employment and must relinquish their jobs to non-dues-paying strikers;

- even if a union miscalculates its economic strength and calls (or prolongs) an ill-conceived strike, individual members of the bargaining unit are unable to preserve their jobs by returning to work, so long as there are more "senior" strikers; and
- pre-strike employees who work during a strike may have their jobs only for the duration of the strike and, at its end, will be subject to displacement—unless they resign from employment before returning to work, and come back as new hires.

At the very least, the novel rule announced by the court below, if allowed to stand, would upset the carefully weighted and long established balance of economic and negotiating power between employers and unions—before, during and after a strike—under both the Railway Labor Act and the National Labor Relations Act.

In any event, the court below lost sight of, or simply disregarded, the fact that by the time IFFA requested reinstatement on behalf of the full-term strikers, some 1,200 former strikers had already done so on their own behalf—and the jobs they filled were no longer "available." *Fleetwood*, 389 U.S. at 381. There is nothing in the decisions of this Court that gives strikers, when the strike is called off, the right to treat occupied positions as vacancies. Nor is there anything that contemplates that strikers may use their pre-strike seniority to obtain a "preference in current employment" (App. Cert. 2) by displacing employees who are occupying the jobs. Thus, whether or not the early returning strikers be labeled (or are) "replacements," or "union members," they are entitled to remain in their jobs, and it is not "discrimination" to decline to allow the strikers to displace them.

It is, moreover, incomprehensible how or why the obligation of employees to pay dues to a union against their will should

require those employees to give up their jobs to unreinstated strikers on the basis of "seniority." (App. Cert. 7) Mere recitation and repetition of the words "discrimination," "union membership" and "union activity"—which have no applicability to the situation here presented—cannot obscure that the very authority on which the court below relied compels the conclusion that TWA had no obligation at the end of the strike to displace working flight attendants (whether new hires or pre-strike employees) in order to create vacancies for returning strikers.

ARGUMENT

I. Under Principles Established By This Court Decades Ago, And Uniformly Applied Until Now, The Flight Attendants Who Exercised Their Right To Refrain From Joining The Strike, Or To Return To Work Before Its End, Have As Great A Right To Retain Their Jobs As Do Newly Hired Replacements And Need Not Be Displaced To Create Vacancies For Later Returning Strikers.

The major purpose of Congress in enacting the Railway Labor Act was to provide a machinery to *prevent* strikes and the interruption of carrier operations. *Detroit & Toledo Shore Line R.R.* v. *United Transp. Union*, 396 U.S. 142, 148 (1969) ("*Shore Line*"); *Texas & N.O. R.R.* v. *Railway Clerks*, 281 U.S. 548, 565 (1930). The Act does not expressly address either the use of self-help measures after the "almost interminable" statutory bargaining and mediation procedures (*Shore Line*, 396 U.S. at 149) have been exhausted, or the status of economic strikers during or after a strike.

Implicit in the Act, however, "is the ultimate right of the disputants to resort to self-help—'the inevitable alternative in a statutory scheme which deliberately denies the final power to compel arbitration.' " *Brotherhood of R.R. Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. 369, 378 (1969). "[I]f the parties exhaust [the statutory] procedures and remain at loggerheads, they may resort to self-help in attempting to resolve their dispute, subject only to such restrictions as may follow from the invocation of an Emergency Board under § 10 of the RLA." *Burlington N.R.R.* v. *Brotherhood of Maintenance of Way Employes*, 107 S. Ct. 1841, 1851 (1987). As this Court has recognized, the availability of self-help measures (including the employer's freedom to operate during a strike with the help of those pre-strike employees and new-hire replacements who wish to work) "may increase the effectiveness of the RLA in settling major disputes by creating an incentive for the parties to settle prior to exhaustion of the statutory procedures . . . ." *Id.* at 1854.

A. The Railway Labor Act: No Statutory Provisions Like Those From Which The Reinstatement Rights of NLRA Economic Strikers Derive

For fifty years under the National Labor Relations Act, federal labor law has struck a delicate and carefully crafted balance between the employee's right to strike and the employer's right to operate and to retain the permanent employees who worked during the strike. *See Mackay Radio*, 304 U.S. at 345-46; *Erie Resistor*, 373 U.S. at 232; *Fleetwood*, 389 U.S. 375; *Laidlaw Corp.*, 171 N.L.R.B. 1366 (1968), *enforced*, 414 F.2d 99 (7th Cir. 1969), *cert. denied*, 397 U.S. 920 (1970) ("*Laidlaw*"); *see also Belknap, Inc.* v. *Hale*, 463 U.S. 491, 524-28 (1983) ("*Belknap*") (Brennan, J., dissenting). In striking that balance, the courts and the National Labor Relations Board ("NLRB") have delineated and defined the rights of economic strikers to reinstatement.

Those rights, however, derive from provisions that Congress chose to include in the NLRA. Congress expressly enacted in the NLRA that nothing "except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike . . ." (29 U.S.C. § 163) and that strikers remain "employees" for purposes of that Act (29 U.S.C. § 152(3)). The Railway Labor Act contains no similar provisions, and this Court has cautioned that the NLRA cannot be "imported wholesale" into the RLA arena and that analogies must be drawn carefully, if at all. *Brotherhood of R.R. Trainmen* v. *Jacksonville Terminal Co.*, *supra*,

394 U.S. at 383; *see also Independent Union of Flight Attendants* v. *Pan American World Airways*, 789 F.2d 139, 141 n.2 (2d Cir. 1986) (specifically as to RLA Section 2 Third and Fourth).[16]

Although the Court's pragmatic balancing of competing interests under the NLRA can provide guidance as to the rules to be applied in an otherwise significantly different statutory framework,[17] the differences in the statutory purposes and language must be taken into account. It is arguable that RLA employers have greater rights than NLRA employers to replace strikers—in light of (i) the absence in the RLA of positive provisions similar to Sections 2(3) and 13 of the NLRA (29 U.S.C. §§ 152(3) and 163); (ii) the scope of RLA § 2 Third and Fourth, which the courts have generally construed as narrower than NLRA § 8(a)(1) and (3); (iii) the stated RLA purpose of "avoid[ing] any interruption . . . to the operation of any carrier" (45 U.S.C. § 151a(1)); and (iv) the public service nature of the transportation industry.

---

16 The court below did not even identify, let alone discuss, any provision of the RLA that TWA had allegedly violated; it did not follow, or even acknowledge, this Court's admonition that any analogy between the RLA and the NLRA must be drawn with care; and it gave no consideration at all to whether a mere allegation that post-certification conduct by an employer may have an adverse impact on a union is sufficient to create a cause of action under RLA § 2 Third or Fourth.

17 As the district court concluded, "it seems desirable to draw on NLRA experience rather than to create novel principles applicable only in the Railway Labor Act context." (App. Cert. 25) In the few other reported cases dealing with the reinstatement rights of RLA strikers, the courts have generally looked to NLRA precedent for guidance. *See, e.g., Air Line Pilots Ass'n* v. *United Air Lines*, 616 F. Supp. 849, 851 (N.D. Ill. 1985), *aff'd in part and rev'd in part on other grounds*, 802 F.2d 886 (7th Cir. 1986), *cert. denied*, 107 S. Ct. 1605 (1987); *Flight Engineers Int'l Ass'n* v. *Eastern Airlines*, 359 F.2d 303, 308 (2d Cir. 1966); *but see Brotherhood of R.R. Trainmen* v. *Jacksonville Terminal Co., supra*, 394 U.S. at 385 n.20 (distinguishing the breadth of NLRA Section 7 from the narrower scope of RLA Section 2 Fourth); and *International Bh'd of Teamsters* v. *Pan American World Airways*, 607 F. Supp. 609, 614 n.5 (E.D.N.Y. 1985) (noting that, under the RLA, "the 'anti-union animus' doctrine has limited application outside the context of representational disputes").

Certainly, however, RLA strikers do not have any greater rights to reemployment than do NLRA strikers. As the district court observed, any contention to the contrary is "wholly lacking in support in the cases." (App. Cert. 25) That lack of support, it may be added, is the result of the failure of the RLA to make any express provision for strikes, or to protect concerted activity generally, as does the NLRA. *See, e.g., Brotherhood of R.R. Trainmen* v. *Jacksonville Terminal Co., supra*, 394 U.S. at 385 n.20. To the extent, therefore, that it is appropriate to look to the principles that have evolved under the NLRA, as did the courts below, such reference can only define the *outer limits* of the right of RLA strikers to reemployment.

B. *Mackay Radio* And Its Progeny: Settled Rules Under The National Labor Relations Act

The right of employers under the NLRA to hire permanent replacements for economic strikers has long been well-settled. *See, e.g., Mackay Radio*, 304 U.S. at 345-46; *NLRB* v. *Brown*, 380 U.S. 278, 292 n.6 (1965) (referring to the employer's "prerogative to hire permanent replacements for [economic] strikers"); *Vulcan Hart Corp.* v. *NLRB*, 718 F.2d 269, 274 (8th Cir. 1983) (describing the right to hire permanent replacements as "one of the employer's primary weapons during an economic strike"); *Hot Shoppes, Inc.*, 146 N.L.R.B. 802, 805 (1964) (footnotes omitted) ("The Supreme Court's decision in [*Mackay Radio*], and the cases thereafter, . . . state that an employer has a legal right to replace economic strikers at will."). And it is plain from the legislative history of the Labor Management Relations Act that Congress was aware of, and has acquiesced in, the *Mackay Radio* rule.[18]

---

18 For example, a 1947 Senate Committee on Labor and Public Welfare report states: "[S]ituations frequently arise wherein the employer has continued to operate his business with replacement workers. If such strike is an economic one . . . , strikers permanently replaced have no right to reinstatement (*NLRB v. Mackay Radio*, 304 U.S. 333)." S. Rep. No. 105, 80th Cong., 1st Sess. 25 (1947), *reprinted in* 1 NLRB, Legislative History of the Labor Management Relations Act, 1947 ("LMRA History"), at 431 (1948). *See also* 93 Cong. Rec. 4310, 4320 (daily ed. April 29, 1947) (statement of Sen. Ball) ("The Supreme Court [in *Mackay Radio*] has held that the em-

The rules concerning reinstatement of strikers are equally well settled. The fundamental principle was stated by this Court fifty years ago:

> *[A]n employer . . . has . . . the right to protect and continue his business by supplying places left vacant by strikers.* And he is not bound to discharge those hired to fill the places of strikers, upon the election of the latter to resume their employment, in order to create places for them. The assurance by [an employer] to those who accepted employment during the strike that if they so desired their places might be permanent [is] not an unfair labor practice *nor [is] it such to reinstate only so many of the strikers as there [are] vacant places to be filled.* (*Mackay Radio*, 304 U.S. at 345-46 (emphasis added; footnote omitted).)

Following this Court's decision in *Mackay Radio*, the National Labor Relations Board and at least some courts had ruled that economic strikers who were replaced, or whose jobs were eliminated during the strike, had no right to reinstatement even when jobs later became available. *See, e.g., Brown & Root, Inc.*, 132 N.L.R.B. 486, 494 (1961), *enforced*, 311 F.2d 447 (8th Cir. 1963); *Bartlett-Collins Co.*, 110 N.L.R.B. 395, 397-98 (1954), *aff'd sub nom. American Flint Glass Workers' Union* v. *NLRB*, 230 F.2d 212 (D.C. Cir.), *cert. denied*, 351 U.S. 988 (1956). Subsequent decisions, however, limited the risks associated with exercise of the right to strike by mitigating the effects of replacement or job elimination.

ployees on strike who have been replaced have no right to reinstatement."), *reprinted in* 2 LMRA History 1090, 1102.

A decade later, the Labor-Management Reporting and Disclosure Act of 1959 was enacted, *inter alia*, to "eliminate the statutory prohibition which presently bars [economic] strikers from voting in representation elections." S. Doc. 10, 86th Cong., 1st Sess. 3 (1959), *reprinted in* 1 NLRB, Legislative History of the Labor-Management Reporting and Disclosure Act of 1959 ("LMRDA History"), at 82 (1959). As one Congressman put it, however,

> The basic rule still stands: An employer hit by an economic strike has the right to hire permanent replacements *for those striking employees who refuse his appeal to return to work.* Once the replacements are hired, the employees still out on strike lose their right to reinstatement in their old jobs. (105 Cong. Rec. A8247, A8249 (daily ed. Sept. 14, 1959) (extension of remarks of Rep. Hagen), *reprinted in* 2 LMRDA History 1817, 1819 (emphasis added).)

In *Fleetwood*, where a strike had curtailed production and resulted in a temporary reduction of jobs, this Court held that the right of economic strikers to reinstatement "cannot depend upon job availability as of the moment when [their] applications are filed." Based on NLRA Section 2(3), the Court reasoned:

> [T]he status of the striker as an employee continues until he has obtained "other regular and substantially equivalent employment." (29 U.S.C. § 152(3)) Frequently a strike affects the level of production and the number of jobs. It is entirely normal for striking employees to apply for reinstatement immediately after the end of the strike and before full production is resumed. *If and when a job for which the striker is qualified becomes available, he is entitled to an offer of reinstatement.* (389 U.S. at 381 (emphasis added).)

Shortly thereafter, the NLRB applied the principle enunciated in *Fleetwood* to economic strikers who had been replaced, and held that strikers who apply for reinstatement at a time when their positions are filled by permanent replacements (and who continue to make known their availability) remain "employees" and as such are entitled to full reinstatement upon the departure of the replacements. *Laidlaw*, 171 N.L.R.B. 1366.[19] The Seventh Circuit, enforcing the Board's order, stated:

19 That a striker, who has not obtained other regular and substantially equivalent employment, remains an "employee" under Section 2(3) of the NLRA means only that he has a continuing relationship with the employer that entitles him to preference over a stranger in filling vacancies (unless the employer has a legitimate and substantial business justification for refusing to reinstate him). *See Fleetwood*, 389 U.S. at 380-81; *NLRB* v. *Transport Co.*, 438 F.2d 258, 264 (5th Cir. 1971) ("[A]s 'employees' under the Act strikers who have not been reinstated or have not found any other regular employment are on what amounts to a preferential hiring list—that is, they are entitled to be reinstated as new jobs are created or as the departure of replacements creates job vacancies before new applicants can be hired.").

There is no question about the retention of the replacements who were hired during the strike on a permanent basis. The only question is whether the strikers are to be considered employees after the strike, having rights to reinstatement if the replacements depart from their jobs. The legitimate business reason for not discharging replacements in order to reinstate strikers, mentioned in *Mackay* and *Fleetwood*, did not authorize denying the Laidlaw strikers reinstatement after the replacements had for one reason or another departed from their jobs subsequent to the strike's termination. Although *there is a "legitimate and substantial business justification" for requiring replaced economic strikers to wait for reinstatement until a vacancy occurs in the labor force*, no justification was advanced by Laidlaw for its decision to consider the employment status of striker-applicants terminated if, on the day they applied for reinstatement, their former positions were still occupied by permanent replacements. (414 F.2d at 105 (emphasis added).)

Nothing in this Court's decisions following *Mackay Radio*, however, or in those of the lower courts and the NLRB, suggests that economic strikers have a statutory right under the NLRA to reinstatement *in the absence of vacancies* in the

---

In addition, once the striker re-enters the workforce, he does so not as a stranger but with all his pre-strike seniority rights. *See Vulcan Hart Corp.* v. *NLRB*, *supra*, 718 F.2d at 275 (emphasis added) ("If the employer can, *on reinstatement*, deny economic strikers the benefits they had accrued prior to the strike (thus treating them in that respect like new hires), it can deny them the protection which the statutory guaranty of continuing employee status implies.")

Until reinstated, however, the striker is not a member of the workforce. *See, e.g., Giddings & Lewis, Inc.* v. *NLRB*, 675 F.2d 926, 930-31 (7th Cir. 1982) (emphasis added; footnote omitted) (Noting that *Erie Resistor* "held that once strikers *reentered the work force* they could not be discriminated against in favor of non-strikers," the court upheld rules providing that, in the event of a layoff, members of the existing work force would be reinstated before unreinstated strikers because the rules did not classify individuals "according to whether or not they engaged in the strike, but rather, according to whether or not they are *in the work force* at the time of a layoff.").

workforce. Thus, there is no sound authority for visiting the consequences of an absence of vacancies "upon the active employees who were themselves exercising a [protected] right by refraining from collective activity." *Lodges 743 and 1746, Int'l Ass'n of Machinists* v. *United Aircraft Corp.*, 534 F.2d 422, 442 (2d Cir. 1975), *cert. denied*, 429 U.S. 825 (1976). As the Second Circuit observed (in a statement that applies equally to early returning strikers and new hires),

> No case insofar as we are aware, has required an employer to lay off its active employees so as to make room for strikers. And any such approach would be fundamentally inconsistent with an employer's right to hire permanent replacements for strikers and retain the replacements after the strike while the strikers remain out of work. (*Id.* at 442.)

Thus, exercise of the right to strike need not be cost-free, and "[t]he labor laws have never guaranteed an economic striker that his job will be there when the strike is over." *NLRB* v. *Southern Fla. Hotel & Motel Ass'n*, 751 F.2d 1571, 1583 (11th Cir. 1985). To the contrary, an employer has the right to continue to operate during an economic strike, and is permitted to recruit and hire replacements by assuring them that they will not be displaced by returning strikers. The honoring of those commitments, without more, is sufficient business justification for refusing to reinstate strikers when the strike ends. As this Court stated in *Belknap*, *supra*,

> The refusal to fire permanent replacements because of commitments made to them in the course of an economic strike satisfies the requirement of [*Fleetwood*] that the employer have a "legitimate and substantial justification" for its refusal to reinstate strikers. (463 U.S. at 504 n.8.)[20]

---

20 *See also NLRB* v. *International Van Lines*, 409 U.S. 48, 50 (1972) ("It is settled that an employer may refuse to reinstate economic strikers if in the interim he has taken on permanent replacements."); *Harding Glass Indus.* v. *NLRB*, 672 F.2d 1330, 1338 (10th Cir. 1982) ("If permanent replacements have been hired before strikers make an unconditional offer to return to work, the employer has a legitimate and substantial justification for refusing to reinstate the strikers.").

A fortiori, there is no need to justify the retention of incumbent employees who worked during the strike.

C. The Settled Rules: Protection of Non-strikers And Early Returning Strikers

The court below acknowledged the established right of employers to fill places left vacant by economic strikers, and recognized that returning strikers have no right to displace those who have permanently replaced them. (App. Cert. 5) It refused, however, to apply the same rule to incumbents because, according to the Eighth Circuit, they did not "acquire the status of permanent replacements." (App. Cert. 8) Precisely what the court meant by that language is not clear; the court did not explicate why incumbents did not have that or equivalent status, why they would need it or how, if at all, they might "acquire" it. It is clear, however, that the Eighth Circuit misapprehended in several respects the NLRA authority on which it relied.

This Court's seminal decision in *Mackay Radio*, illuminated by its subsequent decisions in *Erie Resistor* and *Fleetwood*, makes plain that an economic striker has no right to reinstatement in the absence of a vacancy. As the Court stated in *Mackay Radio*, it is "not an unfair labor practice . . . to reinstate only so many of the strikers as there [are] vacant places to be filled." 304 U.S. at 346. In *Erie Resistor*, construing NLRA § 2(3), the Court went no further than to say that it "preserves to strikers their *unfilled* positions and status as employees during the pendency of a strike." 373 U.S. at 233 (emphasis added). And, in *Fleetwood*, the Court stated that an economic striker is entitled to an offer of reinstatement only "[i]f and when a job for which the striker is qualified becomes available . . . ." 389 U.S. at 381.

Nor is there any basis in those decisions for a contention that a job must be treated as "vacant" at the end of a strike simply because it is held by an incumbent rather than by a new-hire replacement. To the contrary, as the district court correctly concluded, *Mackay Radio*, as construed by this Court in *Erie Resistor*, "protect[s] crossovers as well as new hires from being displaced after a strike." (App. Cert. 22)

Indeed, in each of these cases, the employer had operated during the strike with non-strikers and/or early returning strikers in addition to new-hire replacements. In *Mackay Radio*, for example, those who worked during the strike, to whom this Court said assurances of permanence could lawfully be made and honored, were already employed before a nationwide strike began and were transferred to a location where their services were needed after they chose not to join the strike.[21] *See* 1 N.L.R.B. 201, 206 (1936); 304 U.S. at 337. In *Erie Resistor*, the employer operated during the strike with "new employees, employees on layoff status and returning strikers," all of whom the Third Circuit described as "replacements." 303 F.2d 359, 360 (3d Cir. 1962). In *Fleetwood*, too, approximately half of the pre-strike employees never joined the strike or returned to work before its end. 366 F.2d 126, 127 (9th Cir. 1966); 389 U.S. at 376, 379.

Yet, nowhere in this Court's decisions or in those of the Courts of Appeals and the NLRB is there any suggestion that the employer's retention of incumbents, while strikers remained unreinstated, was unlawful. In fact, in its brief as *amicus curiae* in *Fleetwood*, even the AFL-CIO did not suggest that full-term strikers had a right to *displace* incumbents with less seniority, although (i) there were no vacant positions when full-term strikers sought to return to work and (ii) over two-thirds of the positions in existence at the end of the strike were held by non-strikers and early returning strikers. 366 F.2d at 127, 129. Implicitly conceding the right of all working employees to retain their jobs, the AFL-CIO addressed only the rights of strikers, *vis-a-vis* those of new applicants, to placement in *vacancies* as they became available.[22]

---

21 Here, too, many of the incumbents, when they chose not to join the strike or returned to work during the strike, were assigned to different locations where they were needed. (JA 108-09)

22 Emphasizing that, under Section 2(3) of the NLRA, strikers continue to be "employees" during and after a strike, the AFL-CIO took the po-

In *Laidlaw*, where the NLRB first ruled that replaced strikers have a continuing right to rehire as vacancies occur, approximately thirty percent of the pre-strike employees never joined the strike and others crossed picket lines to return to work before it ended. 414 F.2d at 101; 171 N.L.R.B. at 1384. Neither the NLRB nor the Seventh Circuit, however, found anything unlawful in the employer's retention of non-strikers and early returning strikers at the end of the strike (in addition to new-hire permanent replacements) although some 50 full-term strikers were denied immediate reinstatement because there were no vacancies in the workforce. 171 N.L.R.B. at 1366-67, 1385; 414 F.2d at 103-07.

Laidlaw also established that even *during a strike*, an employee is entitled to *full* reinstatement upon request if a vacancy exists. Concluding that Laidlaw's failure to offer full reinstatement to an early returning striker (rather than offering to hire him as a new employee) was an unfair labor practice, the NLRB reasoned that the failure fully to reinstate a striker to an opening "could only penalize [him] for engaging in concerted activity, was inherently destructive of employee interests, and thus was unresponsive to the requirements of the statute . . . ." 171 N.L.R.B. 1367-68.

The decision below flies in the face of, and would effectively undo, *Laidlaw*'s protection of a returning striker's right, if vacancies are available during the strike (as they were here), to be *fully* reinstated upon application. Under the Eighth Circuit's rule, incumbents who choose to return to work during a strike could avoid displacement at the end of a strike only by quitting their jobs, forfeiting their seniority for all purposes, and returning to work as new-hire replacements. In effect, therefore, the court below would require such strikers, in order to ensure preservation of their jobs, to return to work as new employees.

---

sition that "an employer must honor a striker's continuing application for reinstatement *as jobs open up* and at the earliest possible moment, without regard to whether his job was considered to have been permanently abolished or was being filled by a permanent replacement at the time the application was made." AFL-CIO Amicus Brief, at 11, *reprinted in* 20 U.S. Supreme Court Records and Briefs (Oct. Term 1967) (emphasis added).

That, however, is precisely what *Laidlaw* says the NLRA forbids.

Other decisions of the Courts of Appeals confirm that an employer's right to retain permanent employees who worked during a strike has never before been treated as limited to new-hire replacements and that, absent agreement by the employer to the contrary, unreinstated strikers have no right to displace non-strikers or earlier returning strikers from their jobs. *See, e.g.*, *NLRB* v. *American Olean Tile Co.*, 826 F.2d 1496 (6th Cir. 1987) (employer's retention of early returning strikers at the end of a strike was conceded to be lawful although some full-term strikers were not reinstated); *NLRB* v. *Harrison Ready Mix Concrete, Inc.*, 770 F.2d 78 (6th Cir. 1985) (employer could not be compelled to permit strikers to exercise pre-strike seniority to obtain full-time, rather than part-time, jobs in preference to replacements and earlier returning strikers); *NLRB* v. *Southern Fla. Hotel & Motel Ass'n*, 751 F.2d 1571, 1582-83 (11th Cir. 1985) (no violation for an employer to retain non-strikers in new positions to which they were reassigned during a strike after elimination of their former department, although full-term strikers remained unreinstated); *Vulcan Hart Corp.* v. *NLRB*, 718 F.2d 269, 274 (8th Cir. 1983) (where the court stated that strikers "are entitled to reinstatement as vacancies arise, although they may not displace permanent replacements"—making no distinction between the non-strikers, early returning strikers and new-hire replacements before it); *Randall, Div. of Textron, Inc.* v. *NLRB*, 687 F.2d 1240 (8th Cir. 1982), *cert. denied*, 461 U.S. 914 (1983) (where neither the NLRB nor the court raised any question concerning the propriety of the employer's post-strike retention of early returning strikers); *Wells Fargo Armored Serv. Corp.*, 237 N.L.R.B. 605, 606 (1978), *enf. denied on other grounds*, 597 F.2d 7 (1st Cir. 1979) (although employer had agreed to reinstate strikers in seniority order, no claim that early returning strikers were subject to displacement); *H. & F. Binch Co.* v. *NLRB*, 456 F.2d 357 (2d Cir. 1972) (addressing rights of economic strikers *vis-a-vis* new hires, but making no reference to the many non-strikers retained by the employer); *NLRB* v. *Transport Co.*, 438 F.2d 258, 260 (5th Cir. 1971) ("The Company, having decided to retain

the eight replacements and the three nonstriking drivers . . . ," reinstated only four of seventeen strikers at the end of the strike.).

Until the decision below, no court has suggested that the assurances of permanence approved by this Court in *Mackay Radio* may be made only to new-hire replacements, or that an employer's right to retain "those who worked during the strike" (*Erie Resistor*, 373 U.S. at 232) is limited to new hires. Nor, with the sole exception of the panel majority in *International Ass'n of Machinists* v. *J.L. Clark Co.*, 471 F.2d 694 (7th Cir. 1972) (which considered the post-strike status of a single employee), has any court ruled that an already reinstated striker must literally be a "replacement" for a particular unreinstated striker in order to retain his job at the end of the strike.[23] As Judge Pell observed in the dissent in that case, the decisions of this Court give "no indication that the strikers who returned to work during the strike were any less protected than the new employees"—and there is no reason or authority why former strikers should not be "entitled to the same protection as . . . outsider[s]." 471 F.2d at 699, 700.

That conclusion follows from the rationale of *Mackay Radio* which applies equally to incumbents and permanent replacements. As the district court here said:

> It would seem that employers faced with a strike would have at least as great a practical need for employing crossovers as new hires, if crossovers can be induced to return to work. The inducement of permanent rather than temporary employment is deemed presumptively needed to attract new hires, according to the Court in the landmark

23 In the unlikely event that the Court views who replaced whom as relevant, moreover, the only logical answer is that each of the 2,400 new-hire permanent replacements lawfully hired and retained by TWA took the place of a striker. If they initially replaced incumbents (who were not yet working) then, when those incumbents returned to work, they must have filled "places left vacant by strikers" (*Mackay Radio*, 304 U.S. at 345) and, even under the dubious decision in *Clark*, the incumbents were "replacements" entitled to keep their jobs when the strike ended. Clearly, in any event, the newly hired employees were not, as the strike ended, "replacing" the incumbents with whom they were working side by side.

> decision of *NLRB* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938).
>
> Inducement of similar attractiveness would seem normally required to retain old employees during a strike, or to attract them back. It is surely as difficult psychologically for old employees to abandon their coworkers and cross a picket line as it is for new hires to take such action. (App. Cert. 24; footnote omitted)

The record evidence concerning the experience of TWA's pre-strike employees who exercised their right to work during the strike called by IFFA confirms the district court's thoughtful observations.[24]

II. Relying On Confused And Inapplicable Notions Of "Discrimination," "Union Membership" And "Union Activity," The Decision Below Distorts National Labor Relations Act Authority And Applies That Distortion To The Railway Labor Act.

As demonstrated above, reason, practical experience and authoritative statements of the courts all point to the conclusion that an employer is free, at the end of a strike, to retain those who worked during the strike, be they pre-strike employees or new hires. Clearly, strikers do not have the right to displace new employees who have permanently replaced them. It is equally clear that pre-strike employees who remain at or return to work during a strike cannot be treated—and, until the decision below, have not been treated—as though they were preserving the jobs that they fill for others who have chosen to remain on strike. The distorted and illogical reasoning of the court below in reaching its contrary result is predicated on misleading characterizations of the facts, and consists of nothing more than an

24 *See, e.g.*, IFFA's January 2, 1986 letter to flight attendants (JA 105-06, 136); its April 15, 1986 letter to flight attendants (JA 149-51); IFFA's "Hotline" messages of April 17 and May 6 (JA 154-57); the April 1986 letter from a pre-strike flight attendant who returned to work (JA 141-46); and the affidavit of an incumbent who worked as an instructor during the strike (JA 158-61).

empty recitation of concepts and so-called rules that have no application whatsoever to this case.

A. Only By Describing An Occasion For "Discrimination" That Did Not In Fact Occur, Was The Eighth Circuit Able To Reach Its Novel Result.

In the opening sentence of its opinion on the "cross-overs," the court below misstated the district court's holding as follows:

> *The district court held that the* approximately 1280 striking *employees who "crossed over"* and went back to work during the strike *were* also *permanent replacements* and not subject to displacement by full-term strikers with greater seniority. (App. Cert. 7; emphasis added)

But what the district court actually held was that incumbents were entitled to at least as much protection in their jobs as new-hire permanent replacements—simply recognizing and applying the settled principle that strikers have no right to reinstatement in the absence of vacancies. It was the absence of vacancies—not any "status" or "preference" granted by TWA (App. Cert. 7, 2)—that prevented the reinstatement, at the end of the strike, of most full-term strikers.

Ignoring this principle, however, the Eighth Circuit disingenuously portrayed the end of the strike as an occasion for choice or "preference" by TWA that allowed the court to substitute for the decisions of this Court a discrimination analysis that simply has no applicability here. Thus, the court below began and ended its opinion by speaking of "preference" in employment (App. Cert. 2, 14)—as if the incumbents and the full-term strikers were a pool of applicants for unoccupied positions, and as if TWA had selected from the supposed pool those who would fill the positions. But there was no such pool of non-working employees; there were no unoccupied positions; and TWA made no such selection. The incumbents exercised their right to continue working or resume working during the strike; the strikers exercised their right to continue striking. At the end of the strike, TWA simply left all flight attendants as they were and as *they* had chosen to be—either working or not working—subject to offers of reinstatement to fill vacancies from a preferential rehire list. The operative choice was made not by TWA, but by the employees who chose to strike or not to strike.

The Eighth Circuit's fundamental distortion of these events is further demonstrated by its repeated statements to the effect that TWA "award[ed]" or "accord[ed]" incumbents the "reward" of "permanent replacement status." (App. Cert. 7-9) But TWA did not "award" permanent status to incumbents; they were permanent employees before the strike began. And there was no need that they be "replacements" for others. Those who exercised their right not to join the strike merely continued to work in permanent positions. As to those who initially joined the strike, TWA simply applied the same basic principle, enunciated by this Court, that was later applied to the full-term strikers: upon their unconditional offer to return to work, returning strikers are *entitled* to fill vacant positions for which they are qualified. TWA could not have declined their offer to return to work and given preference to new-hire replacements, even if it had wished to do so.

Thus, even if a discrimination analysis were appropriate here (*but see* pp. 35-36, *infra*), there was no discrimination "among union members" (App. Cert. 7) or otherwise. All flight attendants—whether union members or not, whether active in the union or not—were told that if they did not return to work they might be permanently replaced; all were reinstated if openings existed when they offered to return to work; and, upon reinstatement, all were accorded the full benefit of their seniority. The unreinstated strikers suffered no "discrimination" and were subject to no decision based upon "degree of . . . union activity." (App. Cert. 7) At the end of the strike, they were simply faced with a reality well understood and long accepted as a potential consequence of the decision to strike—deferment of reinstatement due to the absence of vacancies.

B. The Reliance By The Court Below On The "Union Security" Provisions Of The 1981-84 Agreement Is Without Foundation In Law Or In Reason.

;Article 24 of the 1981-84 agreement between TWA and IFFA (JA 62)—even if still in effect—requires nothing more than the payment of union dues as a condition of employment. It

- does not create any vacancies or confer any rights of seniority;
- does not require that those covered by the clause be "union members" (App. Cert. 7);
- does not address questions of discrimination "on the basis of . . . union activity" (App. Cert. 9); and
- most certainly has neither the purpose nor the effect of assuring that no "conflict" or "division" (App. Cert. 9) exists between those pre-strike employees who chose to strike and those who chose not to strike.

The Eighth Circuit's decision in *TWA I* therefore has no conceivable applicability here, whether it was correctly decided or not.[25]

Based on that prior ruling, however, the court below contrived a syllogistic rationale for its holding in this case:

- "TWA may not discriminate among union members based on the degree of their union activity."
- "[A]ll cross-overs must retain their union membership" because "the union security clause which provides that union membership is a condition of continued employment with TWA remains in effect."
- "Accordingly, TWA may not accord cross-overs permanent replacement status and prevent full-term strikers from displacing cross-overs with less seniority because such action impermissibly discriminates *among union members* based on the degree of their union activity." (App. Cert. 7; footnote omitted; emphasis added)

That analysis defies explanation.[26] Indeed, it seems to be only an artificial construct that permitted the court below to distinguish between the rights of the so-called "cross-overs" (who, according to the Eighth Circuit, were subject to displacement at the end of the strike because they were "union members") and those of the new-hire replacements (who, the court said, could retain their jobs because they were not "union members" and therefore could not be "the subject of discrimination based upon union loyalty and activity"). (App. Cert. 7 n.4)[27]

25 Given the Eighth Circuit's heavy reliance on *TWA I* in this case, however, summary reversal of the decision below would be warranted if this Court grants rehearing in No. 86-1650 and reverses the decision in *TWA I*.

26 Apparently recognizing that the Eighth Circuit's reliance in this case on its decision in *TWA I* cannot be justified, the Union has now disavowed it. In its opposition to the petition for rehearing in No. 86-1650 (at p.2), IFFA states that the result in this case "in no way hinges upon . . ." the decision in *TWA I* and that the decision below "did not turn upon the existence of the contract." The Eighth Circuit, however, viewed its decision in *TWA I* as "[m]ost important[ ]" (App. Cert. 7) to the result reached below.

27 Despite its heavy reliance on the concept of "union membership," the Eighth Circuit never delineated what it meant by that term. At several points in its opinion, referring to "closed shop agreements" as requiring "union membership" (App. Cert. 7, 10) and speaking of "resign[ation]" from a union (App. Cert. 8), the court below seemed to mean actual (or full) union membership. On the other hand, it assumed for purposes of its decision that "union members may resign from all obligations except that of paying dues . . ." and noted that those incumbents who had been full members of the Union "have apparently ceased their union memberships except for payment of dues." (App. Cert. 8)

The court's apparent confusion in this regard is illustrated by its citation of RLA Section 2 Eleventh as "authorizing 'closed shop' agreements" (App. Cert. 7), which are, of course, unlawful under the RLA as well as the NLRA (*see* n.14, 15, *supra*), and its statement that a union "cannot penalize its *members* for working during a strike . . ." (App. Cert. 8; emphasis added), although (at least under the NLRA) a union may of course do so. *See NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175 (1967). *Pattern Makers' League of N. Am. v. NLRB*, 473 U.S. 95 (1985), cited by the court below (App. Cert. 8), addressed a situation in which a union had fined *former* members who worked during a strike *after* resigning their union membership.

Mackay Radio, *Erie Resistor* and *Fleetwood*, however, establish the right of those who worked during a strike to keep their jobs *not* by virtue of any discrimination analysis regarding union members or non-members—a subject on which those decisions are entirely silent—but by giving determinative weight to the employer's legitimate interest in operating its business during a strike. This Court did not analyze the retention of replacements and others who worked during the strike in terms of any

decision based on "union loyalty [or] activity." (App. Cert. 7 n.4) It said that an employer's right "to protect and continue [its] business" (*Mackay Radio*, 304 U.S. at 345) justifies giving them assurances of permanence. The reasoning of the court below simply fails to appreciate that, regardless of the appropriateness of a discrimination analysis in other contexts, the decisions of this Court establish that the making and honoring of such assurances is a self-help measure that Congress has permitted employers under federal labor law.

In any event, the untenability of the Eighth Circuit's formulation of its holding in terms of "discrimination," "union members" and "degree of union activity" is revealed by the obvious logical difficulties to which it leads. The court below recognized, for example, that, under *Mackay Radio*, the new-hire replacements—who had less seniority than both the incumbents and the full-term strikers—need not relinquish their jobs at the end of the strike. (App. Cert. 4-6) It also acknowledged that the union security clause "requires that new hires obtain union membership in order to continue employment with TWA." (App. Cert. 7 n.4) Attempting nonetheless to differentiate between the new hires and the incumbents, the court said:

> New hires . . . were not union members when they began work during the strike. Thus, new hires cannot be the subject of discrimination based upon union loyalty and activity. (App. Cert. 7 n.4)[28]

This purported distinction results in discrimination by the court itself on the basis of "union membership." Assuming that the incumbents were "union members" and that the new hires were not, the court concluded that the incumbents, solely by virtue of their "union membership," are subject to displacement by more senior full-term strikers. Thus, under the Eighth Circuit's rule, the court itself gave a "preference" (App. Cert. 2) to new hires with little seniority, over permanent employees with greater seniority, because the former were not deemed to be "union members."

---

28 By that remarkable assertion, the Eighth Circuit would presumably remove from the protection of NLRA § 8(a)(3) all newly hired employees.

Impermissible discrimination based on union activity, moreover, does *not* turn on whether the individuals involved are "union members." *See, e.g., Stepanischen* v. *Merchants Despatch Transp. Corp.*, 722 F.2d 922, 927 (1st Cir. 1983). If, therefore, as the Eighth Circuit said, not displacing incumbents from their jobs at the end of the strike to make room for full-term strikers with greater "seniority" constitutes discrimination based on degree of union activity, it would be just as "discriminatory" not to displace the new hires who exercised their right not to join the strike.[29] But, as even the court below conceded, this Court has made plain that an employer need not displace new hires at the end of a strike to create vacancies for full-term strikers.

Even if a distinction between union members and nonmembers were relevant, moreover, the Eighth Circuit's application of that distinction here does not withstand the slightest scrutiny. When the strike ended, some 1,200 new-hire replacements were "union members" to the same extent, if at all, as were the incumbents.[30] Neither group was required to hold actual membership in the Union (*see* n. 13, 15, *supra*); both were required, at least under *TWA I*, to pay dues to the Union.

Finally, the union security provisions do not confer seniority rights for *any* purpose and cannot be treated as a substitute for a back-to-work agreement. Nor do they have the purpose or effect of establishing the right, as among covered employees, to

---

29 The court below apparently overlooked that new-hire replacements have a right to strike and sometimes do. *See, e.g., Air Line Pilots Ass'n* v. *United Air Lines*, 802 F.2d 886, 890 (7th Cir. 1986), *cert. denied*, 107 S. Ct. 1605 (1987).

30 The Eighth Circuit's focus on the time when the new hires began to work (rather than at the end of the strike) is inexplicable. There is not even a claim that "discrimination" occurred when new hires began their employment or when incumbents were reinstated; TWA had the right to hire permanent replacements, and strikers who offered to return to work during the strike while vacancies were available were entitled to reinstatement. Thus, the point of controversy is at the *end* of the strike when there were more strikers than vacant positions and TWA simply left incumbent employees in place (whether newly hired replacements, non-strikers or early returning strikers) and did not displace them to make room for full-term strikers. It is that so-called "differentiat[ion]" that the court below found impermissible.

exercise seniority to displace employees from the jobs they hold. To the contrary, as this Court has made plain, a "union membership" requirement may affect employment rights *only* to the extent of conditioning employment on the payment of initiation fees and dues. (*See* n.15, *supra*.) The purposes for which seniority may be used are, in any event, a matter for agreement between employer and union. *Aeronautical Indus. Dist. Lodge 727* v. *Campbell*, 337 U.S. 521, 526-27 (1949).

C. The Eighth Circuit's Unarticulated Assumption That Strikers Are Entitled to Reinstatement In Seniority Order Is Incorrect And, In Any Event, Irrelevant.

The court below said that TWA could not "*prevent* full-term strikers from displacing cross-overs with less seniority because such action impermissibly discriminates among union members based on the degree of their union activity." (App. Cert. 7; emphasis added) Nowhere, however, did it identify the source of the right that TWA "prevent[ed]" full-term strikers from exercising—and there is no such right. Most egregiously, the Eighth Circuit did not even allude to any basis in the RLA for the right it assumed.

The district court found as fact that "[t]he contract between IFFA and TWA . . . does not authorize the exercise of seniority rights to obtain reinstatement after a strike." (App. Cert. 22) And, under the NLRA, it is a "settled principle that an economic striker has no statutory right to be recalled by seniority." *Bingham Willamette*, 282 N.L.R.B. No. 165, slip op. at 6 n.5 (1987).[31] As this Court said in *Mackay Radio*, an employer may rely on "skill or ability . . . or any one of a number of methods

31 *Accord, American Olean Tile Co., supra*, 826 F.2d at 1500 ("There is no right to recall according to seniority in the absence of such a provision in a collective bargaining agreement or 'a binding established past practice.' "); *NLRB v. Wells Fargo Armored Serv. Corp.*, 597 F.2d 7, 10 (1st Cir. 1979) (finding "no precedent" for a rule requiring reinstatement in strict seniority order); *Indiana Desk Co.*, 276 N.L.R.B. 1429, 1447 (1985) (noting that employees "did not go on strike on a seniority basis" and holding that they need not be reinstated on that basis); *Bio-Science Laboratories*, 209 N.L.R.B. 796, 796 (1974) ("unreinstated economic strikers do not have the statutory right to recall in accordance with a collective bargaining agreement provision covering recall from layoffs . . .").

of determining which of its striking employees [will] have to wait because [others] had taken permanent positions during the strike . . . ." 304 U.S. at 347.

Here, in any event, there is no issue as to the order in which full-term strikers were reinstated, for TWA voluntarily reinstated them in seniority order, as vacancies occurred. (JA 91) With respect to the early returning strikers, TWA simply did what it was required to do when they offered to return to work; it reinstated them to available vacancies for which they were qualified. The balance established in *Laidlaw*, 171 N.L.R.B. 1366, requires that strikers, including early returning strikers, be fully reinstated upon request if and when a position becomes available; it does not require that non-strikers or former strikers already reinstated be displaced to make room for full-term strikers. Only the openings available at the end of the strike (and those that later become available) are to be allocated among the full-term strikers. Even then, moreover, the openings need not be assigned "on the basis of seniority or in any other particular manner." *Indiana Desk Co., supra*, 276 N.L.R.B. at 1447.

No subsequent decision of the NLRB or the courts expands the *Laidlaw* rights of economic strikers so as to require the displacement of working employees. To the contrary, more recent cases only confirm that non-strikers and early returning strikers are entitled to remain in their jobs unless the employer and union agree otherwise. For example, in *Randall, Div. of Textron, Inc.* v. *NLRB*, 687 F.2d 1240, 1242 (8th Cir. 1982), *cert. denied*, 461 U.S. 914 (1983), where "a steady stream of individual strikers requested leave to return to work during the course of the strike," Randall maintained a chronological list of such strikers and offered job openings to those on the list in preference to hiring permanent replacements. Some strikers were reinstated before the strike ended but, when a full complement of workers was reached, Randall ceased reinstating strikers. After the strike ended,

> [w]hen additional production workers were needed, Randall first recalled persons on the sign-up list, in order of signing. After exhausting the sign-up list, Randall recalled

> persons on the list submitted by the Union, in order of seniority. (*Id.*)

Neither the NLRB nor the Eighth Circuit found anything improper in the reinstatement of early returning strikers in the order of their application, or raised any question concerning the propriety of the post-strike retention of strikers who returned to work before the strike ended.

The Sixth Circuit, in *NLRB* v. *Harrison Ready Mix Concrete, Inc.*, 770 F.2d 78 (6th Cir. 1985), held that an employer could not be compelled to permit reinstated strikers to exercise their pre-strike seniority to obtain full-time (rather than part-time) jobs, in preference to earlier returning strikers. *A fortiori*, full-term strikers would have no right to *displace* junior crossovers. In *NLRB* v. *American Olean Tile Co.*, 826 F.2d 1496 (6th Cir. 1987), the Sixth Circuit confirmed that crossovers who work during a strike need not yield their jobs at the end of the strike to more senior strikers and, like the *Randall* court, found nothing improper in the employer's use of a chronological list of employees who offered to return during the strike when there were no vacancies, to fill vacancies that arose *after* the strike.[32]

In *Giddings & Lewis, Inc.* v. *NLRB*, 675 F.2d 926 (7th Cir. 1982), the Seventh Circuit upheld a seniority system under which employees in the workforce at the time of a *post*-strike layoff (including early returning strikers) would have recall rights in preference to more senior unreinstated strikers. Emphasizing that unreinstated strikers have a right to reinstatement only when a vacancy occurs, the court expressly rejected a claim that such recall rights constituted unlawful discrimination. Drawing no distinction between early returning strikers and new-hire replacements, the Seventh Circuit said:

> The seniority system [at issue] does not discriminate between strikers and non-strikers, nor does it deny unreinstated strikers the right to reinstatement should vacancies occur in the work force. Rather, it constitutes the very

32 On the latter point there was a dissent, but even the dissenting opinion recognizes that there is no right to reinstatement in order of seniority. 826 F.2d at 1507 n.8. Counsel for the union also conceded that "use of the chronological list was lawful during the strike." *Id.* at 1501.

> practice upheld in *Mackay*: the assurance of permanent status to replacement workers. (675 F.2d at 931.)

If the so-called "rule" that the court below announces were correct, the early returning strikers in *Giddings* could not have remained in their jobs long enough to be laid off; they would have been displaced by the more senior strikers upon the strikers' request for reinstatement.

* * *

In sum, stripped of its erroneous assumptions, its mischaracterizations of fact and its confused notions of "union membership," the Eighth Circuit's principal rationale for the conclusion that incumbents are subject to displacement by full-term strikers has nothing left to support it. In effect, it amounts to the imposition on TWA of a back-to-work agreement that was never negotiated or agreed to by the parties.

Yet, judicial imposition of such contract terms is no more consistent with the Railway Labor Act in a post-strike context than it is at any other time. The RLA simply " 'does not undertake governmental regulation of wages, hours or working conditions.' " *Brotherhood of Locomotive Engineers* v. *Baltimore & Ohio R.R.*, 372 U.S. 284, 289 (1963), *quoting Terminal R.R. Ass'n of St. Louis* v. *Brotherhood of R.R. Trainmen*, 318 U.S. 1, 6 (1943); *see also Virginia Ry.* v. *System Fed'n No. 40*, 300 U.S. 515, 548 (1937). Nothing in the Act, or in this Court's decisions interpreting it, suggests that the "strong federal labor policy against governmental interference with the substantive terms of collective-bargaining agreements" (*Chicago & N.W. Ry.* v. *United Transp. Union*, 402 U.S. 570, 579 n.11 (1971)) applies with any less force to the judicial imposition of a back-to-work agreement than it does to any other contract term.

D. The Court Below Apparently Misapprehended And Clearly Misapplied *Erie Resistor*.

In *Erie Resistor*, this Court found inherently discriminatory an employer's grant of twenty years "super-seniority," for purposes of *future* layoffs, to employees who worked during the strike, and the post-strike layoff of reinstated full-term strikers

whose seniority was, as a result of the super-seniority policy, insufficient to retain their jobs. In effect, that policy penalized all *reinstated* full-term strikers by reducing their seniority relative to that of all employees who had worked during the strike. As the Court said, it "operate[d] to discriminate between strikers and non-strikers, both *during and after a strike* and its destructive impact upon the strike and strike activity cannot be doubted." 373 U.S. at 231 (emphasis added).

Here, in contrast, full-term strikers were reinstated with their pre-strike seniority preserved—both absolutely and relative to that of *all* employees who worked during the strike, including the incumbents. Unlike *Erie Resistor*, there is no "cleavage" (373 U.S. at 231) in the workforce: the reinstated full-term strikers are senior to all new-hire permanent replacements, and their seniority relative to that of the incumbents is exactly the same as it would have been if there had been no strike. In these circumstances, to say, as did the court below, that retention of the incumbents gives rise to the same "concerns" voiced in *Erie Resistor* is to say that A is non-A.

The Court made plain in *Erie Resistor*, moreover, that it had "no intention of questioning the continuing vitality of the *Mackay* rule . . ." (*id.* at 232); it merely declined to extend that rule to the "particular means [before it] of attracting replacements." (*Id.*) As the Court stated, "*Mackay* did not deal with super-seniority, with its effects upon all strikers, whether replaced or not, or with its powerful impact upon a strike itself." (*Id.*) Thus, the *Erie Resistor* Court was careful to distinguish the assurances of permanence approved in *Mackay Radio* from an award of super-seniority. Restating the NLRB's analysis of the characteristics and effects of super-seniority, the Court said:

> Super-seniority affects the tenure of all strikers whereas permanent replacement, proper under *Mackay*, affects only those who are, in actuality, replaced. *It is one thing to say that a striker is subject to loss of his job at strike's end but quite another to hold that in addition to the threat of replacement, all strikers will at best return to their jobs with seniority inferior to that of the replacements and of those who left the strike.*
>
> • • •
>
> *Unlike the replacement granted in Mackay which ceases to be an issue once the strike is over, the plan here creates a cleavage in the plant continuing long after the strike is ended.* Employees are henceforth divided into two camps: those who stayed with the union and those who returned before the end of the strike and thereby gained extra seniority. This breach is re-emphasized with each subsequent layoff and stands as an ever-present reminder of the dangers connected with striking and with union activities in general. (373 U.S. at 230-31 (emphasis added).)

In other words, as this Court held in *Mackay Radio* and reaffirmed in *Erie Resistor*, in balancing the competing interests of employers and employees, the risk that an economic striker will lose his job is *not* an impermissible burden on or interference with the right to strike. That risk—known and considered by all responsible unions, and presumably communicated by them to their constituencies—is the sole risk to which the strikers here were exposed. No new or additional risks flowed from TWA's retention of all permanent employees, including incumbents, who worked during the strike.

The Eighth Circuit nonetheless read *Erie Resistor* as voicing "concerns . . . applicable to the status of the cross-overs here." (App. Cert. 8) Specifically, it stated:

> Awarding the crossovers permanent replacement status differentiates employees on the basis of their union activity, induces employees to abandon the strike and is likely to create long-term conflict and division within the workforce of those working together under the union security clause. (App. Cert. 9)

The court below simply ignored that these supposed effects differ in no significant way from "awarding . . . permanent replacement status" to new employees hired during the strike.[33]

Nothing that this Court said in *Erie Resistor*, moreover, or in any other decision, suggests that it is "differentiat[ion]" on the basis of "union activity" for an employer to decline, at the conclusion of a strike, to displace those permanent employees who did the work of the strikers. Not allowing strikers to displace incumbents simply cannot create "long-term conflict and division within the workforce" because, by definition, the strikers are not "in the workforce." Once they are reinstated to vacancies, there is no division even remotely resembling that disapproved by the Court in *Erie Resistor* because they have all their seniority rights and, in fact, are just as senior relative to others in the workforce as they were before the strike.

The concerns expressed by the Court in *Erie Resistor* flowed from the fact that the super-seniority at issue there, *unlike replacement*, would have persistent effects years after the end of the strike by creating a continuing distinction between full-term strikers and others *within the active workforce*—a distinction that would divide the workforce and reopen old wounds every time there was a layoff. As the Court stressed, that division of the workforce would be "reemphasized with each subsequent layoff and [would] stand[ ] as an ever-present reminder of the dangers connected with striking and with union activities in general." 373 U.S. at 231. *See also Belknap, Inc.* v. *Hale*, 463 U.S. 491, 505 n. 8 (1983) (noting that *Erie Resistor* "involved an offer of super-seniority to replacements" and that "[t]he opinion was careful to distinguish cases not involving that element").

---

33 The hiring of permanent replacements may also "induce[ ] employees to abandon the strike . . . ." (App. Cert. 9) As to "conflict and division within the workforce" (App. Cert. 9), it would be naive to suggest that nothing but harmony will prevail between new-hire replacements and strikers reinstated after the strike, especially those whose reinstatement is delayed by the presence of replacements. The Court that authorized the retention of new-hire replacements (with days or weeks of service) cannot have thought it unduly "divis[ive]" (App. Cert. 9) for an employer to retain incumbent employees (with years of service).

No such division or distinction was created here. Nor did TWA "induce" strikers to abandon the strike, other than perhaps by exercising its unquestioned right to hire permanent replacements—an "inducement" approved by this Court fifty years ago. *Mackay Radio*, 304 U.S. at 345-46; *Randall, Div. of Textron, Inc.* v. *NLRB*, *supra*, 687 F.2d at 1244; *see also*, *e.g.*, *Flight Engineers Int'l Ass'n* v. *Eastern Air Lines*, 208 F. Supp. 182, 193-94 (S.D.N.Y.), *aff'd*, 307 F.2d 510 (2d Cir. 1962), *cert. denied*, 372 U.S. 945 (1963); *I. Bahcall Steel & Pipe*, 287 N.L.R.B. No. 139, slip op. at 9 (1988); *The Texas Co.*, 93 N.L.R.B. 1358, 1359 (1951), *enf. denied on other grounds*, 198 F.2d 540 (9th Cir. 1952).

The Eighth Circuit's treatment of post-*Erie Resistor* cases is equally flawed. Typical is its reliance on *George Banta Co.*, 256 N.L.R.B. 1197 (1981), *enforced*, 686 F.2d 10 (D.C. Cir. 1982), *cert. denied*, 460 U.S. 1082 (1983). The vice in *Banta* was not that early returning strikers (as here) *remained* in the positions they occupied during the strike; indeed, that is not what occurred in *Banta*. What the Board found violative of the NLRA, was that—regardless of the positions early returning strikers occupied during the strike, and without reference to the company's production needs—when the strike ended, they were given their respective *pre-strike* job classifications and wage rates. Reinstated full-term strikers, in contrast, were assigned "whatever classification status Banta deemed appropriate," often at wage rates substantially below their pre-strike rates. 686 F.2d at 18; 256 N.L.R.B. at 1219-20.

Also a violation of the NLRA was that, under the company's "Preferential Reinstatement System" ("PRS"), while crossovers enjoyed *all* their pre-strike rights, reinstated full-term strikers suffered continuing post-strike penalties, including reduced "bumping" and rate-retention rights. Indeed, as the Administrative Law Judge emphasized, the substantial and continuing *post*-reinstatement rewards for crossovers and penalties for reinstated full-term strikers were even "more pervasive" in *Banta* than was the super-seniority plan in *Erie Resistor*. 256 N.L.R.B. at 1219-20. In fact, as the Court of Ap-

peals noted, even Banta did "not dispute the discriminatory effect of the PRS." 686 F.2d at 18-19.[34]

The court below also relied on *International Ass'n of Machinists* v. *J.L. Clark Co.*, 471 F.2d 694 (7th Cir. 1972) as announcing a "rule that cross-overs returning to their old positions are not permanent replacements." (App. Cert. 9) If that "rule" was announced in *Clark*,[35] it is contrary to the use of the term "permanent replacement" in *Mackay Radio* and *Erie Resistor* to include all "those who worked during the strike" (373 U.S. at 232), including non-strikers and former strikers. Even if the majority opinion in *Clark* were correct, moreover, it flatly contradicts the Eighth Circuit's apparent assumption that "replacement" means only *new* employees hired during a strike, since it acknowledged that an incumbent employee could be a "replacement."[36]

In any event, no other decision has so much as suggested that incumbents must literally be "replacements" for particular strikers in order to retain their jobs at the end of a strike. For good reason, therefore, the district court declined to follow *Clark*—emphasizing that the majority gave no authority or reason for its ruling and recognizing that the dissent by Judge Pell (who thought it clear that the employee in question had re-

---

34 The *Banta* court did not say "that the nature of the benefit conferred on cross-overs was irrelevant." (App. Cert. 9) It did say, citing *Erie Resistor* and other cases in which the employer had granted crossovers or new-hire replacements a preference over *reinstated* full-term strikers, that "*[i]n such cases*, the nature of the particular benefit is irrelevant." 686 F.2d at 19 (emphasis added). Clearly, what the court meant was that an employer may not discriminate between *reinstated* full-term strikers and others in the active workforce, be it in seniority for purposes of protection from layoff (as in *Erie Resistor*) or in rates of pay and other benefits (as in *Banta*).

35 *Clark* was a suit to enforce an arbitral award and the opinion of the majority is far from clear. It is clear, however, that in *Clark*, reinstatement following the strike was governed by a strike settlement agreement that provided for reinstatement on a seniority basis. 471 F.2d at 697.

36 The court below, moreover, did not even consider whether the incumbents here had returned to their pre-strike jobs. In fact, few, if any, of them returned to the same assignments they had before the strike. (JA 108-09) Therefore, even under the *Clark* majority's definition, virtually all the incumbents would be "replacements."

turned to his own pre-strike job and equally clear, on the reasoning of *Mackay Radio* and *Erie Resistor*, that he was entitled to remain there when the strike ended (471 F.2d at 699-70)) is far more persuasive. (App. Cert. 23-24) As the district court also noted, moreover, recent decisions "make questionable whether *J.L. Clark* would still be followed [even by the Seventh Circuit]." (App. Cert. 25) *See, e.g., Giddings & Lewis, Inc.* v. *NLRB*, 675 F.2d 926, 930 (7th Cir. 1982), where the Seventh Circuit stated:

> [I]n *NLRB v. Erie Resistor Corp.* . . . the Court held that once strikers reentered the work force they could not be discriminated against in favor of non-strikers. *Erie Resistor* thus involved only the rights of strikers who had been reinstated. (citation omitted)[37]

Erie Resistor, and subsequent cases, make clear that what is forbidden, because they are inherently destructive of the right to strike, are rewards for non-strikers or early returning strikers and penalties for full-term strikers that persist *after* strikers have returned to the work force. What is forbidden is the creation of continuing distinctions between strikers and non-strikers *in the workforce*, by a grant of "super-seniority" as in *Erie Resistor* itself, or by other forms of continuing discrimination within the active workforce, such as granting preferential rates

---

37 It is not correct that the Seventh Circuit has "recently approved reliance on *J.L. Clark*." (App. Cert. 9) In *Air Line Pilots Ass'n* v. *United Air Lines*, 802 F.2d 886, 898 (7th Cir. 1986), *cert. denied*, 107 S. Ct. 1605 (1987), the Seventh Circuit does not, at the page indicated or elsewhere, even cite to the *Clark* case. What it says is that, at least where anti-union animus has been established, non-strikers cannot be awarded preferred positions that they did *not* occupy during the strike in preference to more senior reinstated strikers. The district court in the *United* case had cited *Clark* solely in support of the proposition "that in order for a crossover to be entitled to a job assigned during a strike, the employer must prove that the replacement actually occupied the position during the strike." 614 F. Supp. 1020, 1046. Contrary to the implication of the court below, neither the district court nor the Seventh Circuit approved the "rule" that an early returning striker had to fill a position other than his own in order to keep his position at the end of the strike. And the Seventh Circuit in *Giddings*, *supra*, plainly held that early returning strikers may retain their jobs at the end of a strike as against the claims of unreinstated senior strikers. (*See* pp. 40-41, *supra*.)

of pay (as in *George Banta Co.* v. *NLRB*, *supra*), or denying reinstated strikers preferred shifts (as in *Randall, Div. of Textron, Inc.* v. *NLRB*, *supra*).

TWA created no such distinctions. In the exercise of its right to continue to operate, it told newly hired strike replacements and all pre-strike employees that if they worked during the strike so that TWA could operate, they would not be ousted in favor of strikers when the strike ended. Any such promise arguably discourages, to some extent, exercise of the right to strike, as the Court recognized in *Erie Resistor*. 373 U.S. at 232. At the same time, the Court confirmed that the protected right to strike is not an "unqualified right," and preserves to strikers only "*their unfilled* positions and [under the NLRA] status as employees during the pendency of a strike." *Id.* at 233 (emphasis added). It does not give strikers the right to take positions that are *filled* at the end of the strike, whether those positions are permanently filled by newly hired employees, by employees who never joined the strike, or by strikers who have previously returned to work—any more than it gives strikers the right to demand that production be increased and more jobs created. *See Fleetwood*, 389 U.S. 375.

The plain and undisputed fact is that when the full-term strikers offered to return to work, there were fewer than 200 vacancies in TWA's flight attendant workforce. Those vacancies were promptly filled by returning strikers—who have been credited with their full seniority—and no striker was denied reinstatement to an available vacancy. There is, therefore, no basis in this record or in law for any conclusion that TWA violated the Railway Labor Act.

CONCLUSION

The decision below, which would work a major change in the long-settled relationships between employers and unions, and between strikers and non-strikers, is not grounded in the language or purpose of the Railway Labor Act; nor is it supported by precedent, analogy under the National Labor Relations Act, or reason. It should therefore be reversed.

Respectfully submitted,

MURRAY GARTNER
PROSKAUER ROSE GOETZ
& MENDELSOHN
300 Park Avenue
New York, New York 10022
(212) 909-7000

Counsel of Record

PAUL E. DONNELLY
MARK A. BUCKSTEIN
MICHAEL A. KATZ

Attorneys for Petitioner

Of Counsel

CAROLE O'BLENES
TOBY R. HYMAN
ANDREW P. MARKS

May 26, 1988

APPENDIX A

APPENDIX A

Supplementary Text of Statutes Involved

RAILWAY LABOR ACT

45 U.S.C. § 151a. *General purposes*

The purposes of the chapter are: (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this chapter; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions.

NATIONAL LABOR RELATIONS ACT

29 U.S.C. § 157. *Right of employees as to organization, collective bargaining, etc.*

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

29 U.S.C. § 158. *Unfair labor practices*

(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

• • •

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective-

bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 159(e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further*, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employees to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

• • •

29 U.S.C. § 163. *Right to strike preserved*

Nothing in this subchapter, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right.